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In The Supreme Court Of The United States

CENTRAL VIRGINIA COMMUNITY COLLEGE,
VIRGINIA MILITARY INSTITUTE,
NEW RIVER COMMUNITY COLLEGE, and
BLUE RIDGE COMMUNITY COLLEGE,
Petitioners,

v.

BERNARD KATZ, Liquidating Supervisor for
Wallace's Bookstores, Inc.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF OHIO AND 48 OTHER STATES AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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STATEMENT OF *AMICI* INTEREST

Amici State of Ohio and 48 other States and Commonwealths ("*amici* States") have a vital interest in this case, as it implicates one of the most controversial and publicly-debated legal issues of recent years—the power of Congress to abrogate the States' Eleventh Amendment immunity. The issue is squarely presented here in a context not yet directly addressed by the Court, but vital to a State's ability to control its fisc: bankruptcy.

The States are frequently brought into contact with the bankruptcy system, both as creditors, and as parties that, as here, lawfully received payments from the debtor prior to the petition and find themselves subject to suit to recover the payments. In the first quarter of fiscal year 2005 alone, over 400,000 bankruptcy cases were filed. In many of these, one or more States may have received some payment that could be attacked as a preference. And in each such case, a State may find itself haled into adversary litigation by a private litigant seeking to recover money, in a court hundreds or thousands of miles away. Under the Sixth Circuit's view, a debtor may institute a suit against a State and force the State to defend its rights at a time and place solely of the debtor's choosing.

Bankruptcy suits are particularly onerous for States because they are unpredictable, can occur anywhere in the country, and can involve large sums of money. Preference suits in particular are often filed in a blunderbuss fashion, with little or no investigation whether the transactions were outside the ordinary course of business or are otherwise defensible. In some cases, the amounts sought are tiny in comparison to the cost of defending the action. The State governments, unlike the federal government and other large creditors, do not have offices and counsel in every jurisdiction. The procedural difficulties and costs inherent in being forced into litigation in a distant forum can greatly burden the public treasury.

The *amici* States therefore urge the Court to overrule the court below and hold that the Eleventh Amendment bars preference suits and actions on prepetition contracts filed in bankruptcy against unconsenting States.

SUMMARY OF ARGUMENT

In case after case, the Court has affirmed that Congress cannot use *any* of its Article I powers to override the States' Eleventh Amendment immunity. The early history of the Constitution and of bankruptcy law confirms that there is no reason to create an exception to this rule for Congress's Article I bankruptcy powers. History unequivocally demonstrates that the Founders understood that although the States ceded some sovereign law-making *power* over bankruptcy, the States retained their full sovereign *immunity*. The historical evidence indicates no pattern of forcing States to submit to suits by private parties in bankruptcy. Indeed, the Founders' writings and speeches, the debates of the ratifying conventions, public reaction to early case law and the history of bankruptcy and insolvency law all confirm that there was no intent by the Founders to involuntarily subject States to suits in bankruptcy and there is no reason for this Court to do so now.

Moreover, while the States may have ceded some of their sovereign power to legislate, this Court confirmed in *Seminole Tribe of Florida v. Florida* that the extent of the law-making power ceded to Congress in the Constitution is irrelevant to the States' sovereign immunity. 517 U.S. 44, 72 (1996). And even if the extent of States' sovereign immunity in a particular area of law were somehow linked to the extent of sovereign power ceded in the plan of the Convention, the States ceded less power in bankruptcy than in other Article I areas.

For instance, the Court has held that Congress's power under the Commerce Clause is so broad that it preempts States from even legislating within its sphere—the so-called "dormant commerce clause" doctrine. In the bankruptcy context, by contrast, States are allowed to pass—and have passed—insolvency and bankruptcy laws in the absence of federal bankruptcy coverage. *Sturgis v. Crowninshield*, 17 U.S. (4 Wheat.) 122 (1819); *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213 (1827). Thus, the Court's established precedent, which rejects abrogation in the Commerce Clause context, forecloses it here.

In addition, the history of bankruptcy legislation and the surrounding commentary contain no mention of the States having ceded sovereign immunity in bankruptcy. After a contentious early history, the first permanent bankruptcy law was passed in 1898—only a few years after *Hans v. Louisiana*, 134 U.S. 1 (1890) definitively held that the States retained sovereign immunity. No mention is made in either the 1898 statute or surrounding commentary that bankruptcy was an exception to *Hans*. Indeed, Congress attempted to abrogate the States' immunity for the first time only in 1978—hardly evidence of an understanding "in the plan of the convention." In short, twentieth-century amendments to bankruptcy statutes cannot serve to change a clear constitutional understanding about structural limits on congressional power.

Finally, Katz cannot rely on the federal court's *in rem* jurisdiction, as the petitioner did in *Tennessee Student Assistance Corporation v. Hood*, 541 U.S. 440 (2004) (*Hood II*), as a means of avoiding the Eleventh Amendment problems his claims face. Unlike the discharge order at issue in *Hood II*, this case involves the liquidating supervisor seeking to recover money paid to the State on preference and

contract grounds. The Court implied in *Hood II* that "an adversary proceeding by the bankruptcy trustee seeking to recover property in the hands of the State on the grounds that the transfer was a voidable preference" is outside the bankruptcy court's *in rem* jurisdiction. 541 U.S. at 454. The Court held as much in *Hoffman v. Connecticut Dept. of Income Maintenance*, 492 U.S. 96 (1989) and *United States v. Nordic Village Inc.*, 503 U.S. 30 (1992). Thus, such claims remain subject to the Eleventh Amendment's limitations on federal court jurisdiction and, under those limitations, Katz cannot proceed on his claim here.

ARGUMENT

This case permits the Court to reach and resolve the abrogation issue it left open in *Hood II*. The Sixth Circuit in *Hood v. Tennessee Student Assistance Corp.* (*In re Hood*), 319 F.3d 755 (6th Cir 2003) (*Hood I*) held that the States lacked any sovereign immunity in the bankruptcy context—a radical departure from the other circuits to have considered the issue.[1] The Court granted certiorari to resolve that issue, but ultimately determined that *Hood II* involved an *in rem* proceeding in which the Eleventh Amendment did not apply. 541 U.S. at 451-455.

Because the Court did not reach the abrogation issue in resolving *Hood II*, *Hood I* remains binding precedent in

[1] *Georgia Higher Education Assistance Corp. v. Crow (In re Crow)*, 2004 U.S. App. Lexis 26872; *Nelson v. Lacrosse Co. Dist. Atty. (In re Nelson)*, 301 F.3d 820 (7th Cir. 2002); *Mitchell v. Franchise Tax Bd. (In re Mitchell)*, 209 F.3d 1111, 1120 (9th Cir. 2000); *Sacred Heart Hosp. of Norristown v. Pa. (In re Sacred Heart Hosp. of Norristown)*, 133 F.3d 237, 245 (3d Cir. 1998); *Dept. of Transp. & Dev. v. PNL Asset Mgmt. Co. LLC (In re Fernandez)*, 123 F.3d 241, 246 (5th Cir. 1997); *Schlossberg v. Md. (In re Creative Goldsmiths of Wash., D.C., Inc.)*, 119 F.3d 1140, 1147 (4th Cir. 1997).

the Sixth Circuit, and was applied in the case below. *Hood I* held that the States ceded their sovereign immunity in bankruptcy court, as well as their sovereign authority over the area of bankruptcy, in the plan of the Constitutional Convention. The *Hood I* Court thus concluded that Congress had the power to abrogate—and did abrogate—the States' immunity in enacting 11 U.S.C. § 106(a).

Thus, despite overwhelming precedent to the contrary, the *Hood I* court adopted an obsolete and discredited theory of sovereign immunity. Under the Sixth Circuit's rationale, the States, in giving up their sovereign *power* to legislate in the area of bankruptcy, also ceded their sovereign *immunity* from suit in federal bankruptcy court. This idea is nothing new—it was the rationale behind the now-defunct plurality opinion in *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1988), holding that Congress could abrogate the States' sovereign immunity under the Commerce Clause. It was also the basis for the dissent in *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 277-78 (1985), which found support in precisely the same conjunction of *Federalist Papers* 81 and 32 that the *Hood I* court relied on. However, that argument was expressly overruled in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996).

In fact, in case after case, the Court has affirmed that Congress cannot use *any* of its Article I powers to override the States' Eleventh Amendment immunity. The *Seminole Tribe* opinion in particular makes two points central to the *amici* States' position here. First, the extent of law-making power ceded to the federal government is irrelevant to the retention of sovereign immunity by the States. "Even when the Constitution vests in Congress complete law-making authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States." *Seminole Tribe*, 517

U.S. at 72-73; see also, *Id.* at 73, n.16. ("it has not been widely thought that the federal antitrust, bankruptcy, or copyright statutes abrogated the States' sovereign immunity.")

Second, the *Seminole Tribe* Court held that Article I did not give Congress the power to overcome sovereign immunity. "The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction." *Id.*[2]

In numerous cases since *Seminole Tribe* the Court has reiterated those principles with regard to other Article I clauses and laws passed under their authority. *Florida Prepaid Postsecondary Education Expense Bd. v. College Savings Bank*, 527 U.S. 627, 636 (1999) (Patent Clause); *Alden v. Maine*, 527 U.S. 706 (1999) (Fair Labor Standards Act); *Bd. of Trustees of the Univ. of Alabama v. Garrett*, 531 U.S. 356, 364 (2001) (Americans with Disabilities Act). *See also City of Boerne v. Flores*, 521 U.S. 507 (1997); *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261 (1997); *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Bd.*, 527 U.S. 666 (1999); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 79 (2000).

As demonstrated below, the historical background of the Bankruptcy Clause and early American bankruptcy law, as well as the history of the Eleventh Amendment, make clear that the *Union Gas* rationale has no more viability

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[2] Similarly, the fact that bankruptcy courts are authorized under Article I rather than Article III gives Congress no power to overcome the States' sovereign immunity. Congress cannot circumvent the limitations placed on Article III courts by creating Article I courts. *See Federal Maritime Commission v. South Carolina Ports Authority*, 535 U.S. 743, 756-767 (2002).

under the Bankruptcy Clause than it does under the Interstate Commerce, Indian Commerce or Patent clauses.

And, as also demonstrated below, the Court's precedent holds that a bankruptcy court's *in rem* jurisdiction does not extend to an adversary action seeking to recover property in the hands of a State. Such actions fall under the traditional Eleventh Amendment prohibition against federal court judgments that must be paid out of a State's treasury.

A. The early history of the Constitution illustrates that the founders distinguished the sovereign power of the States from the sovereign immunity of the states in the context of bankruptcy.

In addition to the overwhelming precedent holding that the States retained sovereign immunity from suit at the same time they alienated sovereign power to pass laws in those areas of law enumerated in Article I, the early history of the Constitution and of bankruptcy law illustrates the founders' understanding that the States retained sovereign *immunity* in bankruptcy, while having ceded at least some sovereign law-making *power* in that area.

A comprehensive picture of the founders' intent and understanding of State sovereign immunity at the time of the debates and ratification of the Constitution has been well documented. *Alden v. Maine*, 527 U.S. at 716-724. That history will not be repeated in detail, except to make the following points.

1. The general understanding at the time of the founders was that States would continue to enjoy sovereign *immunity* from suit in all areas of law, despite having alienated their sovereign *power* in some areas. *Alden*, 527 U.S. at 716-724. Advocates repeatedly assured the people "in no uncertain

terms that the Constitution would not strip the States of sovereign immunity." 527 U.S. at 716.

Both James Madison and John Marshall spoke at the Virginia ratifying convention, supporting the understanding that a State would not be sued without its consent. *Alden*, 527 U.S. at 717-18; 3 Elliot, *Debates on the Federal Constitution* 533, 555 (2d Ed. 1854). The New York and Rhode Island conventions expressly proclaimed that the Constitution did not allow private persons to sue the States. 527 U.S. at 718-19; 1 *Debates* at 336, 329.

Nor, as suggested in *Hood I*, 319 F.3d at 767, is it remarkable that bankruptcy was not specifically mentioned in the ratification debates. Indeed, there was no debate in the ratification conventions about the States' sovereign immunity under the Patent Clause, the Indian Commerce Clause or any other specific part of Article I. With the exception of general areas of law, such as "chancery, admiralty and common law," 3 *Debates* at 533, 555, the debaters spoke in generalities about civil lawsuits and state sovereignty. The statements of Patrick Henry and Edmund Pendleton, cited by the *Hood I* court, are not to the contrary. 3 *Debates*, 539-546 (statement of Patrick Henry); 3 *Debates* 549 (statement of Edmund Pendleton).

As the Court has noted, "[I]n exercising its Article I powers, Congress may subject the States to private suits . . . only if there is 'compelling evidence' that the States were required to surrender this power to Congress pursuant to the constitutional design." *Alden*, 527 U.S. at 730, *citing Blatchford v. Native Village of Noatak*, 501 U.S. 775, 781 (1991). The absence of a discussion on bankruptcy does not constitute the sort of "compelling evidence" necessary to show that the States surrendered immunity in the constitutional design.

2. The Sixth Circuit's reliance in *Hood I* on a conjunction of the *Federalist Papers* Nos. 81 and 32 is equally misguided. In the *Federalist Papers*, Alexander Hamilton was careful to distinguish "an alienation of State sovereignty"—by which he meant legislative authority, and which he had discussed extensively in the *Federalist* No. 32—from State sovereign immunity from suit, which he discussed in *Federalist* No. 81. Contrary to the assertions of the Sixth Circuit in *Hood I* (and of the dissent in *Atascadero*), Hamilton's reference to an alienation of state sovereignty in *Federalist* No. 32 was not intended to include an alienation of sovereign immunity in some areas of law.

A close reading of *Federalist* No. 81 indicates that Hamilton was carefully separating the two concepts. He first introduced the subject of sovereign immunity: "It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent." He went on to state that "[u]nless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States . . . ." *Federalist* No. 81. In other words, if the Constitution does not take away sovereign immunity, it remains with the States.

Hamilton then pointed out that the subject of States alienating sovereign *power*—that is, the ability to pass laws on a particular subject—had been discussed in *Federalist* No. 32: "The circumstances which are necessary to produce an alienation of State sovereignty were discussed in considering the article of taxation, and need not be repeated here." He went on to conclude that despite this alienation of sovereign *power*, the States' sovereign *immunity* remained: "A recurrence to the principles there established [*i.e.*, principles established in *Federalist* 32's discussion of sovereign power] will satisfy us, that there is no color to pretend that the State

governments would, by the adoption of that plan [*i.e.*, the adoption of a plan that alienates state law-making power over some areas of law], be divested of the privilege of paying their own debts in their own way . . .." *Federalist* No. 81.

In *Federalist* No. 81, Hamilton sought to quell the fear that sovereign immunity *in any context* would be given up if the Constitution were ratified, and so distinguished the States' alienation of limited law-making *power* to Congress—discussed in *Federalist* No. 32—from the States' retention of sovereign *immunity* to suit in federal courts—discussed in *Federalist* No. 81. If he were not distinguishing the two concepts, his concluding statement would either be a logical *non sequitur*, or highly misleading. The Court has long assumed that Hamilton meant what he said—ceding legislative *power* has no effect on sovereign *immunity*.

3. Public reaction to early case law also illustrates that the founding generation understood the distinction between the alienation of sovereign power in certain areas—which it accepted—and a surrender of sovereign immunity—which it did not. To repeat the oft-told tale, when, just five years after the Constitution was ratified, the Supreme Court held in *Chisholm v. Georgia*, 2 U.S. (Dall.) 419 (1793), that a private citizen of another State could sue the State of Georgia, the decision "fell upon the country with a profound shock." *Alden*, 527 U.S. at 720, quoting 1 Warren, *The Supreme Court in United States History* 96 (rev. ed. 1926); *accord*, *Hans v. Louisiana*, 134 U.S. 1, 11 (1890); *Principality of Monaco v. Mississippi*, 292 U.S. 313, 325 (1934); *Seminole Tribe*, 517 U.S. at 69. The press responded with outrage. *Alden*, 527 U.S. at 720. It took Congress just one day to introduce a proposal to amend the Constitution to reverse *Chisholm*'s result. 527 U.S. at 721, citing 4 *Annals of Congress* 25, 30, 477, 499 (1794). The Eleventh Amendment was eventually passed with only one day's debate in each

house of Congress. *Alden*, 527 U.S. at 721, citing 4 *Annals* at 30-31, 476-78.

Yet, while there was no doubt a lively debate about the topic at the time, the early cases delineating supreme federal law-making *power* (as opposed to the States' sovereign *immunity*) did not result in the constitutional crisis precipitated by *Chisholm*. For instance, in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), the Court struck down a Maryland tax law as being in conflict with federal power. In *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), the Court struck a New York law as being in conflict with the federal commerce power. Neither of these decisions engendered the controversy surrounding *Chisholm*.

Thus, only a few years after *Chisholm* and the final ratification of the Eleventh Amendment, the Court issued ground-breaking opinions establishing the supremacy of federal law. Yet *McCulloch* and *Ogden* did not "[fall] upon the country with a profound shock" as did *Chisholm*. No alacritous move to amend the Constitution followed these early decisions. The States accepted the loss of law-making power to the federal government in the limited areas spelled out by the Constitution, while they most emphatically had not accepted a loss of sovereign immunity in any area enumerated in Article I.

B. The early history of bankruptcy, together with modern case law, illustrate that the States retain sovereign immunity regardless of the extent of the power ceded to Congress.

As explained above, *Seminole Tribe* expressly held that the extent of the law-making power ceded to Congress in the Constitution is irrelevant to the States' sovereign immunity. 517 U.S. at 72. But even if the extent of States'

sovereign immunity in a particular area of law were somehow linked to the extent of sovereign power ceded in the plan of the Convention—which the *amici* States do not concede—the States arguably ceded *less* power in the area of bankruptcy than in other Article I areas such as commerce.

During lengthy periods of the country's early history, no federal bankruptcy law was in effect. Duncan, *From Dismemberment to Discharge: The Origins of Modern American Bankruptcy Law*, 100 Commercial L. J. No. 2, 191, 218-19 (1995) ("Duncan"); Friedman, *A History of American Law*, 238-40 (1973); Cordry, *Seminole Seven Years On*, in 2003 Annual Survey of Bankruptcy Law, William L. Norton, Jr., Ed. (Thompson-West) pp. 401-409 ("Cordry"). State bankruptcy and insolvency laws were effective during these periods, despite some initial controversy as to whether they were preempted by the Bankruptcy Clause. Friedman at 274; Duncan at 216, 219-220.

In *Sturgis v. Crowninshield*, 17 U.S. (4 Wheat.) 122 (1819), and later in *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213 (1827) the Court held that there was no dormant bankruptcy power, and in the absence of superseding national bankruptcy laws, state bankruptcy and insolvency laws were valid, if they did not violate the Contracts Clause. 17 U.S. (4 Wheat) at 196; 25 U.S. (12 Wheat.) at 268. *See also Geery's Appeal*, 43 Conn. 289 (1876); *Griswold v. Pratt*, 50 Mass. 16 (1845); *John McConologue's Case*, 107 Mass. 154 (1871).

In contrast, the Interstate Commerce Clause carries with it a "dormant" power—that is, States are precluded from passing laws in the area, even if Congress has not done so. *See Camps Newfound/Owatonah v. Town of Harrison*, 520 U.S. 564, 571-72 (1997), and cases cited therein. Yet, the Court has held that the States did not alienate their sovereign immunity in the context of the Commerce Clause. *College*

Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999).

Indeed, the *Seminole Tribe* Court held that the States have even less power over Indian commerce than they do over interstate commerce, yet the States have sovereign immunity in the area of Indian commerce: "[T]he background principle of state sovereign immunity embodied in the Eleventh Amendment is not so ephemeral as to dissipate when the subject of the suit is an area, like the regulation of Indian commerce, that is under the exclusive control of the Federal Government." 517 U.S. at 62, 72. In other words, the extent of the power ceded to Congress is irrelevant—the States enjoy sovereign immunity from suit in federal court regardless of the particular Article I power exercised by Congress. If the extraordinarily broad powers under the Commerce Clause and the Indian Commerce Clause do not suffice to give Congress the power to abrogate, surely the more limited Bankruptcy Clause also does not give Congress that power.

Therefore, the early history of the Constitution and of bankruptcy laws, together with more recent case law, demonstrates that Congress's power to abrogate immunity in bankruptcy court is no more potent than it is with regard to any other Article I power.

C. The early history of bankruptcy reveals no established practice of subjecting States to suit in bankruptcy.

In *Hans v. Louisiana*, 134 U.S. 1 (1890), the Supreme Court held that the Constitution was not intended to create unusual or unheard of suits that did not exist at the time of the ratification. There was "a presumption that no anomalous and unheard-of proceedings or suits were intended to be

raised up by the Constitution—anomalous and unheard of when the Constitution was adopted." 134 U.S. at 18; see also *Blatchford*, 501 U.S. at 781. In other words, absent an established pattern of allowing suits against the States at or near the time of the ratification, the States are presumed to retain their sovereign immunity. The history of bankruptcy reveals no such established pattern.

The founding generation left no indication that States were to be sued in bankruptcy. Longstanding principles of English statutory interpretation dictated that no statute was presumed to cover the Crown unless clear reference of such an intention was made, and therefore the Crown was exempt from suit under the laws. *United States v. Herron*, 87 U.S. 251, 255 (1873). The first bankruptcy law, passed in 1800, specifically precluded the impairment of debts owed to the United States or to a State. Tabb, *The Historical Evolution of the Bankruptcy Discharge*, 65 Am. Bankr. L.J. 325, 346-47 (1991) ("Tabb, 1991"). Although later bankruptcy laws did not include such language, the Court held that these laws did not discharge debts to the United States and noted with approval a similar application to the States by state courts. *Herron*, 87 U.S. 251, 260-62 (1873), citing *People v. Herkimer*, 4 Cowen 348 (N.Y. Sup. 1825), and *Commonwealth v. Hutchinson*, 10 Pa. 466 (1849); see also *Connecticut v. Shelton*, 47 Conn. 400 (1879).

By the time Congress enacted the first bankruptcy law—thirteen years after the ratification of the Constitution, *Chisholm* had already "[fallen] upon the country with a profound shock," and the Eleventh Amendment had already been proposed, passed and ratified. Tabb, *The History of the Bankruptcy Laws in the United States*, 3 Am. Bankr. Inst. L. Rev. 5, Spring 1995, p. 9 ("Tabb, 1995"). Nothing in that early enactment contradicts the presumption that the founders

intended the Eleventh Amendment to apply to bankruptcy as much as to any other Article I power.

Later history is not to the contrary. As explained above, after almost a century with no long-lasting legislation, Congress finally passed the first comprehensive and permanent federal bankruptcy law in 1898. *See* King, *Collier on Bankruptcy* (15th Ed. 1979), Vol. A, Pt. 3. Only eight years before, the Court had issued *Hans*—which firmly and finally established the States' sovereign immunity from suit in federal court. Despite the currency of *Hans*, no provision of the 1898 bankruptcy act hints that the *Hans* doctrine should be ignored in the area of bankruptcy. And contemporary commentators make no mention of State sovereign immunity in the 1898 bankruptcy act, despite criticism -of many aspects of the new law. *See, e.g.*, Hotchkiss, *Bankruptcy Laws, Past and Present*, The North American Review, Vol. 167, Issue 504, November 1898, pp. 580-591.

In fact, it was almost two hundred years after the Constitution was ratified, in 1978, before Congress attempted to abrogate the States' sovereign immunity in bankruptcy court. Thus, there is no evidence of any understanding at the time that the States were giving up sovereign immunity in the area of bankruptcy "in the plan of the convention."

Therefore, the plan of the convention and the early histories of Eleventh Amendment jurisprudence and bankruptcy law establish no tradition of private suits against the States. To the contrary, history shows an understanding that the States "retain the dignity" of sovereign immunity "though not the full authority" of independent sovereigns with regard to *all* Article I powers—including bankruptcy. *Alden*, 527 U.S. at 715.

D. A bankruptcy court's *in rem* jurisdiction does not extend to "an adversary proceeding by the bankruptcy trustee seeking to recover property in the hands of the State on the grounds that the transfer was a voidable preference."

Unlike the situation in *Hood II*, the claims here do not fall within the bankruptcy court's *in rem* jurisdiction. Therefore, regardless of the extent to which *in rem* jurisdiction may have different treatment under the Eleventh Amendment, the claims here remain subject to its constraints. The action here does not merely seek to subject the State to an order granting the debtor a global discharge of all her debts as in *Hood II*, but rather seeks recovery of funds on preference and contract theories directly from the State. Not only do the principles of *in rem* jurisdiction not apply to this case, but the Court has acknowledged in previous cases, including *Hood II*, that in a preference action against a State, Eleventh Amendment immunity bars relief.

The *Hood II* Court described two hallmarks of *in rem* jurisdiction as it pertains to discharge. First, the court's power was premised on its control over the debtor's property, and not its control over the creditors. 541 U.S. at 446-48.

A second hallmark of *in rem* jurisdiction described in *Hood II* is that the action is one settling the ownership of the *res*, not just between the parties to the action, but "against the world." In the case of bankruptcy discharge, a bankruptcy court's *in rem* jurisdiction "permits it to 'determine all claims that anyone, whether named in the action or not, has to the property or thing in question. The proceeding is "one against the world."'" *Hood II*, 541 U.S. at 448, quoting 16 J. Moore, et al., Moore's Federal Practice § 108.70[1], p. 108-106 (3d ed. 2004). Such jurisdiction allows the court to make a global determination of the debtor's status as a discharged

bankrupt. 541 U.S. at 453. See also *Hanover Nat. Bank v. Moyses*, 186 U.S. 181, 192 (1902).

In this case, unlike in *Hood II*, neither hallmark of *in rem* jurisdiction applies. This case arises not from a discharge action to determine the debtor's status, but from an action filed against the Commonwealth of Virginia to recover money asserted to be a voidable preference. The federal court is seeking the return of property unequivocally in the possession of the Commonwealth of Virginia and to which the Commonwealth of Virginia undoubtedly owns title. Any judgment the court might issue would determine a claim against only the Commonwealth, and not "against the world." And unlike in *Hood II*, the liquidator does seek affirmative relief from a State, and is subjecting an unwilling State to a coercive judicial process. See 541 U.S. at 450.

In at least two cases, this Court has held that actions such as this one, in which a trustee or liquidator files an adversary proceeding seeking to recover a transfer from a government, sovereign immunity applies to bar the action. In *United States v. Nordic Village*, 503 U.S. 30 (1992) the Court held that an adversary action against the federal government to return a transfer made to the IRS in payment of a tax debt was barred by sovereign immunity. The *Nordic Village* Court first rejected the argument that such an action is an exercise of *in rem* jurisdiction, noting that "Respondent sought to recover a sum of money, not 'particular dollars,' so there was no *res* to which the court's *in rem* jurisdiction could have attached." *Id.* It then further dismissed the argument that *in rem* jurisdiction, even if applied, could override sovereign immunity in an action to recover a monetary transfer. *Id.* at 38.

And directly on point here is *Hoffman v. Connecticut Dept. of Income Maintenance*, 492 U.S. 96 (1989). In

Hoffman, the Court found that an adversary action against the State of Connecticut to recover Medicaid and tax payments as preferences was barred by Eleventh Amendment immunity. 492 U.S. at 102. "[A] State that files no proof of claim would be bound, like other creditors, by discharge of debts in bankruptcy, . . . but would not be subjected to monetary recovery." *Id.* The *Hoffman* Court found that Congress had failed to abrogate immunity under then-section 106(c). 492 U.S. at 104.

Finally, the Court in *Hood II* took care to distinguish an *in rem* action in discharge from "an adversary proceeding by the bankruptcy trustee seeking to recover property in the hands of the State on the grounds that the transfer was a voidable preference."—the exact situation faced by the Court here. 541 U.S. at 454. In short, the Court's precedents already hold that this case is an action *in personam*, and not *in rem*.

Alternatively, even if preference claims are treated as arising under *in rem* jurisdiction, they are a type of *in rem* claim that remains subject to the Eleventh Amendment. An action that seeks to affect the right of a State in its ownership of an asset—even if characterized as *in rem*—is not allowed under the Eleventh Amendment. *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 281-82, 291, 307 (1997) (quiet title action brought against a State is barred by the Eleventh Amendment).

And the *Hood II* Court implied that the same principle applies to claims arising under *in rem* jurisdiction in bankruptcy cases. 541 U.S. at 448. See also *Nordic Village*, 503 U.S. at 38, citing *United States v. Shaw*, 309 U.S. 495 (1940): "[W]e have never applied an *in rem* exception to the sovereign-immunity bar against monetary recovery, and have suggested that no such exception exists." *Id.*

Here, there is no question that the State has lawful possession of the funds. Thus, to the extent these claims seek return of money lawfully paid to the State, they are fully subject to the Eleventh Amendment, whether the court's jurisdiction is *in rem* or *in personam*.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

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